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IN THE

Supreme Court of the United States

MARALYN S. JAMES,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF PROCEEDINGS[1]

The Complaint in this matter was filed on April 30, 2002. (Jt. Apx. p. 18). The Complaint alleged discrimination under the Americans with Disabilities Act, under the Age Discrimination in Employment Act, and retaliation. (*Id.*) In June 2003, the Metropolitan Government was granted summary judgment on the disability and age discrimination claims. (Jt. Apx. pp. 47, 59). The retaliation allegations remained. (Jt. Apx. p. 59).

The jury trial on this matter was held regarding the retaliation allegations in May 2004. (Jt. Apx. pp. 69, 235). The Metropolitan Government moved for judgment as a matter of law after the Petitioner presented the majority of her proof[2] and at the conclusion of all proof (both motions were denied). (Jt. Apx. pp. 495, 498).

The jury rendered a partial verdict in favor of Petitioner (finding retaliation by defendant but not finding a hostile

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1. Petitioner Marilyn James will be referred to as "Petitioner." The Metropolitan Government of Nashville and Davidson County will be referred to as "Defendant" or the "Metropolitan Government." The Sixth Circuit Court of Appeals will be referred to as the "Sixth Circuit" or "Court of Appeals." The Petition for a Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred to as (Petition, Appendix __). Citations to items not so included in the Petition will be made to the Joint Appendix on file with the Clerk of the Sixth Circuit and designated as (Jt. Apx. __).

2. Plaintiff presented additional witnesses, taken out of order due to scheduling conflicts, after defendant began putting on its case in chief.

work environment or constructive discharge) and awarded compensatory damages in the amount of Forty Two Thousand ($42,000) Dollars. (Petition, Appendix 13). The Metropolitan Government filed a Motion to Alter or Amend, or in the Alternative, Motion for New Trial, which was denied in June 2004. (Jt. Apx. pp. 236, 280).

In December 2005, the Sixth Circuit reversed the district court's decision to deny the Metropolitan Government's motion for judgment as a matter of law. (Petition, Appendix 1). The Sixth Circuit denied Petitioner's petition for rehearing en banc or panel rehearing on April 14, 2006. (Petition, Appendix 15).

Petitioner filed her petition for a writ of certiorari in the U.S. Supreme Court on July 13, 2006.

SUMMARY OF ARGUMENT

The Metropolitan Government opposes Petitioner's petition for certiorari and her request for remand to the Sixth Circuit for reconsideration under *Burlington Northern & Santa Fe Railway Co., v. White*, 126 S. Ct. 2405 (June 22, 2006). There is no need to remand this case because the complaints Petitioner made against her employer are not, as a matter of law, employment decisions that would have "dissuaded a reasonable worker from making or supporting a charge of retaliation."

This Response will cite relevant Seventh and District of Columbia Circuit cases (*Burlington* explicitly stated that it was choosing the standard used by these Circuits to determine what constitutes retaliation) to show that the denial of a lateral transfer, poor performance evaluations, the imposition of

work goals prior to any protected activity occurring, and the denial of Petitioner's disability pension by an independent board are not adverse actions that can support a retaliation claim. For these reasons, there is no need to remand for reconsideration because the Metropolitan Government is still entitled to judgment as a matter of law.

RELEVANT FACTS

This retaliation suit was brought by Petitioner against her employer, the Nashville Public Library (a department within the Metropolitan Government) after the Library finally insisted, after six years of poor performance evaluations and warnings, that she improve her job performance. (Petition, Appendix 2).

Beginning in 1996 (long before she made an internal complaint of a hostile work environment), her supervisors began informing her in her annual evaluations that she must improve the speed of her work. (*Id.*) For instance, her 1999 evaluation noted that she was cataloguing "just over 2 titles per hour (as opposed to the 7-8 per hour expected) . . . Continued low output in terms of her primary job responsibility is not acceptable and will have serious consequences if the situation is not corrected." (*Id.*) The performance evaluations from 1996 through 2001 consistently criticized her output and she knew she was not cataloguing materials as quickly as her coworkers. (*Id.*)

On October 3, 2001, Petitioner was upset over being asked to catalogue a collection of books by a deadline that she felt was unfair, and so delivered a letter to Library Director Donna Nicely alleging that she was subject to a "hostile work environment" created by her immediate supervisor, Linda Neff. (*Id.*)

At the end of this year, Petitioner's poor performance caused her to fail an annual evaluation. (Petition, Appendix 3). Petitioner then filed an EEOC charge against the Library. (*Id.*) Around this time, Petitioner asked for a lateral transfer to an audio visual Librarian II position. (*Id.*) She was not selected for this job. (*Id.)*

By April 1, she had not met the goal she had been given of cataloguing an average of 6 items per hour - but she was not disciplined, demoted or terminated. (*Id.*) Instead, she was given more time to improve, was offered techniques to improve her output, and the Library accommodated her request that she be allowed to adjust the lights around her computer and obtain special computer glasses. (*Id.*)

Petitioner was scheduled for a re-evaluation on May 16, 2002. (Petition, Appendix 4). However, on May 13, 2002, she began taking sick leave when her physician informed the Library that she could not meet the goals set for her. (*Id.*)

Around this time, the Library attempted to accommodate her physician's concerns about stress and meeting goals by offering Petitioner a Librarian I position. (*Id.*) This position was a step down in title – it was a Librarian I job. However, for several months this Librarian I position would pay more than plaintiff's Librarian II position. (Jt. Apx. pp. 182, 298-300). Then it would slightly decrease to pay less than a Librarian II position; and after about 1 ½ years, the pay would change again so that the Librarian I job paid more than a Librarian II position. (Jt. Apx. p. 182). After a few more months it would go back down below the Librarian II salary. (*Id.*) Petitioner was given credit for her seniority by being placed at a high position in the series of "steps" for salaries within the Librarian I classification. (Jt. Apx. p. 299).

This job was offered to Petitioner as an accommodation, because it was a job that her physician had indicated she could do (her doctor had advised that she limit stress and work at a job without quotas for production). (Jt. Apx. pp. 298-299, 307-310). The job would not have had any supervisory or lead responsibilities that might create stress on Petitioner. (*Id.*) Petitioner testified that she could have done this job. (Jt. Apx. p. 432).

Petitioner did not take the job, instead choosing to apply for a disability pension. (Petition, Appendix 4). Petitioner claimed the government misrepresented to the Benefit Board that the Librarian I salary would be the same, however, she herself informed the Benefit Board that her salary would be slightly lower with the Librarian I position. (*Id.*) Therefore the Benefit Board was fully aware of the salary issues.

The Benefit Board, after considering Petitioner's application and arguments, did not grant her a disability pension. (*Id.*) Petitioner then took an early service pension. (Petition, Appendix 5).

REASONS FOR DENYING THE PETITION

A. There Is No Need To Remand For Reconsideration Under The New *Burlington* Standard, Because Under This Standard For Retaliation, The Metropolitan Government Is Still Entitled To Judgment As A Matter Of Law.

1. The *Burlington* standard still requires an injury or harm.

The U.S. Supreme Court's opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, does not state that each and every slight felt by an employee now constitutes retaliation. 126 S. Ct. at 2405. To the contrary, the *Burlington* opinion holds that "the anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Id.* at 2414. The opinion goes on to state that "a plaintiff must show that a reasonable employee would have found the challenged action **materially** adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 2415 (emphasis added). The standard is intended to prohibit employer actions that are likely "to deter victims of discrimination from complaining to the EEOC." (*Id.*)

In choosing this standard, the U.S. Supreme Court explicitly stated that it was choosing the standard used by the Seventh and District of Columbia Circuits to determine what constitutes retaliation. The Court stated that

> We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In

> our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

Burlington *at 2415*. Under the new *Burlington* standard, as applied by the Seventh and District of Columbia Circuits in the past, the Metropolitan Government is still entitled to judgment as a matter of law.

2. Decisions of the Seventh and District of Columbia Circuits, applying the standard adopted by the Supreme Court in *Burlington*, show that Petitioner's allegations of wrongdoing do not constitute retaliation.

A summary of Petitioner's allegations of adverse actions against her are as follows:

- denial of lateral transfer
- bad employment evaluations
- impositions of cataloguing goals
- denial of her disability pension

(Petition, Appendix 7).

A review of the decisions by Seventh and District of Columbia Circuits, made prior to the *Burlington* decision but using that standard, shows that these allegations, as a matter of law, are not employment actions that can constitute retaliation.

These Circuits have made clear that every potentially objectionable action by an employer does not constitute an adverse action that can support a retaliation claim:

> We therefore agree with several other circuits that in order to support a claim of retaliation a plaintiff must demonstrate the "employer's challenged action would have been material to a reasonable employee," which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Washington*, 420 F.3d at 662; *see, e.g., Manning v. Metropolitan Life Ins. Co., Inc.*, 127 F.3d 686, 692 (8th Cir. 1997) (**"not everything that makes an employee unhappy is an actionable adverse action**"); *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (dictum noting **"there is room for a *de minimis* threshold" in claims of retaliatory conduct**).

Rochon, 438 F.3d at 1219-1220. And the Seventh Circuit has ruled that an adverse employment action is not every action, but "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat. Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

In its *Washington* decision, the Seventh Circuit took pains to explain that a complaint of retaliation arising from retaliatory action or actions at the workplace must show that the action had a material adverse or effect on employment, but that an allegation of retaliation occurring outside the workplace, causing an IRS audit for example, could not be expected to depend on any adverse employment action. *Washington*, 420 F.3d at 660-661. Following that reasoning the *Washington* Court further explained that although recent decisions of other panels on retaliation cases in the Seventh Circuit used the term "adverse employment action," they should be understood to primarily refer to the "materiality" requirement applicable to any action. *Id.* at 662-663.

A review of the Seventh and Ninth Circuit decisions regarding adverse actions shows that, under the *Burlington* standard, the Metropolitan Government is entitled to judgment as a matter of law in this case.

a. The Denial of A Lateral Transfer Does Not Constitute An Adverse Action.

The denial of a lateral transfer does not constitute an adverse action that can support a retaliation claim. The D.C. Circuit held this in a case involving a bank employee who alleged she was retaliated against when her employer reassigned her to a job she thought was undesirable, and later was not selected for a position she did find desirable. *Brown v. Brody*[3], 199 F.3d 446 (D.C. Cir. 1999). In that case the D.C. Circuit stated that:

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3. *Brown v. Brody* was cited with approval by *Rochon*, 438 F.3d at 1219, one of two cases that the U.S. Supreme Court explicitly cited as an example of the new *Burlington* standard for retaliation. *Burlington* at 2415.

> **A plaintiff** who is made to undertake or **who is denied a lateral transfer that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury** unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. **Mere idiosyncrasies of personal preference are not sufficient to state an injury**.

Id. at 457 (emphasis added).

b. Poor Employment Evaluations Do Not Constitute An Adverse Action.

Poor employment evaluations do not constitute an adverse action that supports a retaliation claim. The Seventh Circuit Court of Appeals made this ruling in a case involving a university employee who alleged retaliation, shown by a poor performance evaluation and other actions, after she reported sexual harassment. *Whittaker v. Northern Illinois University*, 424 F.3d 640 (7th Cir. 2005). The Seventh Circuit stated that:

> **While Whittaker's negative evaluation, written warnings, and placement on "proof status" are putatively disciplinary measures, none "result[ed] in tangible job consequences and therefore are not adverse employment actions actionable under Title VII."** *Longstreet v. Ill. Dept. of Corrections*, 276 F.3d 379, 384 (7th Cir. 2002)(holding that plaintiff's "negative performance evaluations and being required to substantiate that

> her absences from work were illness-related . . . did not result in tangible job consequences and therefore are not adverse employment actions actionable under Title VII"); ***Oest v. Ill. Dept. of Corrections*, 240 F.3d 605, 613 (7th Cir. 2001)(holding that neither "unfavorable performance evaluations" nor "oral or written reprimands" constitute adverse employment actions under our case law).**

Id. at 647-648 (7th Cir. 2005) (emphasis added).

The reasoning behind this holding is that there were no negative consequences for the plaintiff as a result of her negative evaluation. *Id.* at 648. "Typically, adverse employment actions are economic injuries." *Markel v. Board of Regents of University of Wisconsin System* 276 F.3d 906, 911 (7th Cir. 2002). "[T]he adverse action must materially alter the terms and conditions of employment." *Stutler v. Illinois Dept. of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001). The terms and conditions of Whittaker's employment, however, were never altered as a result of her poor evaluations. *Whittaker* at 648; also *Hottenroth v. Slinger*, 388 F.3d 1015, 1030 (7th Cir. 2004) ("It is well established that unfulfilled threats that result in no material harm cannot be considered an adverse employment action under Title VII").

The D.C. Circuit has also held that a poor employment evaluation does not constitute an adverse employment action in a retaliation case. *Brown*, 199 F.3d at 458. The D.C. Circuit ruled that

> Just as lateral transfers do not ordinarily constitute "adverse actions," a similarly thick body of precedent

> . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions.

(*Id.*) In that case also, the reasoning was related to the fact that the employee's poor evaluation did not have any consequences (did not affect her grade or salary). (*Id.*)

c. The Imposition of Cataloguing Goals, Prior To Any Protected Activity Does Not Constitute An Adverse Action.

The "imposition" of hourly cataloguing goals as complained of by Petitioner cannot constitute an adverse action that can support a retaliation claim. In fact, as the Sixth Circuit correctly stated in its recitation of the facts, the expectation or job requirement for cataloguing an average of 7-8 book titles per hour was in place at least as early as 1999. (Petition, Appendix 2). Petitioner's performance evaluation for that year noted that her average performance of 2 titles per hour was not acceptable in view of the job requirement. (*Id.*)

It is entirely accurate to say that Petitioner's first written protest over working conditions in October 2001 (her internal complaint made by letter to the Library Director), was a reaction to the Library's expectation that she meet these objective job requirements. (Petition, Appendix 2). Therefore, even if her October letter could be construed as protected activity, *the objective job requirement that she catalogue a certain number of books, and the series of warnings when she did not meet the requirement preceded her alleged protected activity by at least two years.*

Moreover, Petitioner's first clearly protected activity, the EEOC discrimination charge of January 29, 2002, came even later in time and after the Library gave her a failing performance evaluation, in December 2001, based on her failure to improve her speed at cataloguing book titles. (Petition, Appendix 3). Thus, Petitioner's apparent claim that the Library's enforcement of the "quota" for cataloguing followed her complaint of discrimination is simply wrong under the undisputed facts. (*See* Petition for Certiorari, p. 4).

The analysis recently adopted by this Court in *Burlington* requires an alleged retaliatory act to be materially adverse to a reasonable employee. *Burlington* at 2415. It determines materiality by adopting the Seventh Circuit's rationale of considering the deterrent effect of a contested action on a reasonable employee's exercise of a protected right. (*Id.*); *Rochon*, 438 F.3d at 1219-1220. It is logical to the point of being obvious that action taken prior to any protected activity cannot be the basis for a charge of retaliation both because there is nothing for the employer to retaliate against and because the employee was not deterred from protected activity. As this Court said in *Burlington* "Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title II complaint." *Burlington* at 2416. Petitioner's contention, then, regarding the "quota" is actually one of discrimination under 42 U.S.C. § 2000e-2(a) (not retaliation). However, the sole issue before this Court in the instant case is retaliation under 42 U.S.C. § 2000e-3(a).

The undisputed facts further support the correctness of the Sixth Circuit's decision because as that Court stated in early 2002 the Library actually **lowered** the requirement for Petitioner to an average of 6 catalogued titles per hour from

the 7-8 titles stated in 1999. (Petition, Appendix 4). Moreover, the Library made other accommodations to assist Petitioner in 2002. (Petition, Appendix 4). Therefore, even under the new *Burlington* standard, the Library's imposition of requirements or goals for cataloguing book titles and the expectation that Petitioner would meet those goals, all which occurred prior to any protected activities, cannot form the basis for a claim of retaliation.

d. The Denial of Petitioner's Application For A Disability Pension Cannot Constitute Retaliation.

In another exaggeration, Petitioner contends that the Library retaliated by fighting her application for disability benefits (often called a pension) with a "vengeance" and thereby caused the Benefit Board to deny it. (Petition for Certiorari, p. 5). The undisputed proof is that the Benefit Board is a board or agency within the Metropolitan Government that has the final, independent authority to determine whether an employee is medically eligible for disability benefits and to grant or deny an application. (Jt. Apx. pp. 446-454). Petitioner attempts to cast the Benefit Board as nothing more than a rubber stamp for the wishes of a department, but the proof is that the Benefit Board is legally required to function independently of an employing department. (Jt. Apx. p. 449). Moreover, the Library's supposedly vengeful opposition consisted of answering questions posed by the Benefit Board. (Jt. Apx. pp. 449-451).

One of the factors the Benefit Board must consider is whether an employee is medically able to perform comparable work within the Metropolitan Government. (Jt. Apx. p. 453). The Library informed the Benefit Board of its offer of the

Librarian I position to Petitioner as an accommodation to Petitioner after receiving the reports of her personal physician. (Jt. Apx. pp. 298-299, 307-310). Although a lesser position, the Sixth Circuit correctly noted that the salary of the Librarian I position would have fluctuated both above and below Petitioner's Librarian II position. The Librarian I position was higher for three months, lower for 1 ½ years and then higher again. (Jt. Apx. pp. 182, 298-300). The only error the Sixth Circuit correctly attributed to the Library is that it's representatives did not go further in its answer than the first 3 months' salary. (Petition, Appendix 4). However, the Sixth Circuit stated that Petitioner provided corrected salary information to the Benefit Board prior to its decision to deny her application. (Petition, Appendix 8).

This Court's decision in *Burlington* does not mandate remand for reconsideration of this issue. Although the Sixth Circuit ruled that the Library's error or oversight was not an adverse employment action because it did not affect the Benefit Board's decision, it should also fail the materiality test for the same reason. It had no effect. Therefore, a reasonable employee would not be deterred from exercising a protected right by an ineffectual act or omission. *Washington*, 420 F.3d at 661-662.

Another reason against a remand is that the Sixth Circuit could have just as easily rejected this claim on the grounds that there is no causation between the alleged retaliatory act and any harm to Petitioner. The act or omission of the Library did not cause the Benefit Board to reject Petitioner's claim. Some degree of causation between the protected act and harm is necessary to support a claim of retaliation. *Clark County School Dist. v. Breeden*, 121 S. Ct. 1508, 1510 (U.S. 2001); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792

(6th Cir. 2000). Causation was not at issue in the Court's *Burlington* decision and, therefore, it has no effect on prior law.

3. Applying the law to these facts, Petitioner never suffered any injury or harm under the Burlington standard.

A review of the facts in this case show that Petitioner never suffered any injury or harm under the *Burlington* standard.

For example, the denial of her request for a lateral transfer to an audio visual Librarian II position (Petition, Appendix 3) is not an adverse employment action as a matter of law. *Brown*, 199 F.3d at 457.

Similarly, Petitioner's failure of an annual evaluation does not constitute an adverse employment action. *Whittaker*, 424 F.3d at 647-648; *Brown v. Brody*, supra. The reasoning that supported these holdings (that there were no negative consequences as a result of the poor evaluations) is found here also – even though Petitioner did not meet the goals set for her by her supervisors, she was not disciplined, demoted or terminated. (Petition, Appendix 3). Instead, she was given more time to improve, was offered techniques to improve her output, and the Library accommodated her request that she be allowed to adjust the lights around her computer and obtain special computer glasses. (*Id.*)

The imposition of cataloguing goals on Petitioner's work also does not constitute an adverse employment action, where she was given these goals long before she undertook any protected activity. *See Burlington* at 2415; *Rochon*, 438 F.3d

at 1211. These goals were set by at least 1999 and her first arguably protected activity (an internal complaint to the Library Director) took place in October 2001. (Petition, Appendix 2).

Finally, the denial of Petitioner's disability application does not constitute an adverse employment action, where the independent Benefit Board denied her disability pension. (Petition, Appendix 8). The action complained of, the Library's alleged failure to fully explain the salary fluctuation in the job offered to Petitioner, could not be an adverse employment action since it had no effect on the Board's decision (because Petitioner fully informed the Benefit Board, prior to its vote on her case, of the salary fluctuation). This denial could not be an adverse action where an act taken had no effect. *Washington*, supra at 661-662; *Brown*, 199 F.3d at 458. In addition, the fact that there was no causation between the denial of the disability pension and the Library's action also prevents this case from meeting the standard for a *prima facie* case of retaliation. *Clark County School Dist.*, 121 S. Ct. at 1510.

When the law of the new *Burlington* standard is applied to the facts of this case, the Metropolitan Government is still entitled to judgment as a matter of law. For these reasons, respectfully, there is no need to remand this case back to the Sixth Circuit for reconsideration under *Burlington*.

CONCLUSION

There is no need to remand this case because the complaints Petitioner made against her employer are not, as a matter of law, employment decisions that would have "dissuaded a reasonable worker from making or supporting a charge of retaliation." For these reasons the Metropolitan Government respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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